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The Public Trust Doctrine: A Plea for Precision

Lee Hargrave*

This article urges three basic concepts in response to broad statements about the public trust doctrine in recent writings and cases. It attempts to present a more precise analysis of judicial power to control uses of public property under Louisiana law. The three basic points are:

1. Louisiana law does not encompass the common law public trust doctrine.
2. Louisiana law does not need the common law public trust doctrine.
3. Federal law imposes a limited public trust doctrine applicable to waterbottoms acquired by the state by virtue of its inherent sovereignty.

Though the expression "public trust doctrine" is often used with different meanings, it is used here to refer to a body of law governing use of public lands and waterbottoms that contains "some concept of a legal right in the general public; it must be enforceable against the government; and it must be capable of an interpretation consistent with contemporary concerns for environmental quality."¹ Advocates of the doctrine go beyond the general notion that government must always act in the public interest. They distinguish "between the government's general obligation to act for the public benefit, and the special, and more demanding, obligation which it may have as a trustee of certain public

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1. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 474 (1970). "In some cases a governmental agency or official is not sued directly. Instead, the defendant may be a private party whom the government has inadequately regulated." *Id.* at n.14.

"The public trust doctrine differs from regulatory schemes for coastal management in several respects. First, the doctrine is created, developed, and enforced by the judiciary. While the doctrine is fully binding law on state government, it stems from the courts rather than from the legislature. The doctrine also contains several features not generally found in statutes. Its scope is flexible, and courts may expand or limit it on a case-by-case basis. When properly invoked, the doctrine can limit private property rights while avoiding claims of unconstitutional takings. Unlike statutes, the doctrine has a quasi-constitutional nature. The legislature may extinguish the doctrine, but only in limited, explicitly-stated circumstances, and only for other public purposes." Ralph W. Johnson et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 Wash. L. Rev. 521, 524-25 (1992).

resources."² Though the basic metaphor invoking the trustee as fiduciary may be acceptable in political debate and in generalized statements of policy, it is not helpful as a legal concept in a state such as Louisiana which has adopted more precise and exact statutory and constitutional provisions on the subject. It is inconsistent with Louisiana law in purporting to allow courts more discretion than the state's statutes confer.

Proponents of the doctrine admit it is not a long-standing, clear, historical body of law. It is a theoretical construct developed recently and promoted to give judges more authority to control governmental action in the areas of environmental protection and access to public lands and waters. Its leading exponent states, "Other than the rather dubious notion that the general public should be viewed as a property holder, there is no well-conceived doctrinal basis that supports a theory under which some interests are entitled to special judicial attention and protection. Rather, there is a mixture of ideas which have floated rather freely in and out of American public trust law. The ideas are of several kinds, and they have received inconsistent treatment in the law."³ His thrust is to urge the courts to expand and develop those ideas in a common law development.

Some writers have argued that such a doctrine ought to be applied by Louisiana courts and they urge there exists in Louisiana something called a "public trust doctrine."⁴ Most of these writers are sympathetic

2. Sax, *supra* note 1, at 478.

3. *Id.* at 484. On the questionable common law bases for the public trust doctrine, see Glenn J. MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and some Doctrines that Don't Hold Water*, 3 Fla. St. U. L. Rev. 511 (1975). He refers to the "supposed" common law public trust doctrine: "The point is that Angell and Kent, and the multitude of courts that have announced the American rule, have relied on an erroneous historical view of English fact and English law. First, as a matter of fact, the English shore was not owned by the king; by 1216 virtually the entire shore was de facto owned by private proprietors. Secondly, the English rule that was 'invented' and eventually adopted falls far short of the absolute rule of substantive property law articulated by Angell and Kent." *Id.* at 567. He concludes, "The public trust doctrine was born of such as this. Nonexistent at English common law, the doctrine was created by an obscure and unprepared state court judge, adopted by the inventive Roger Taney, and repeated forever after in hundreds of American decisions, affecting title to millions of acres of submerged land." *Id.* at 591.

4. Nelea A. Abshear, Note, *Constitutional Law and the Environment: Save Ourselves, Inc. v. Louisiana Envtl. Control Comm.*, 59 Tul. L. Rev. 1557, 1559 (1985), commenting favorably on *Save Ourselves Inc.* stated: "Louisiana agencies and officials have an affirmative duty of environmental protection. This duty is mandated by both the Louisiana Constitution and statutory provisions governing the state's natural resources. Within this constitutional-statutory framework, the public trust doctrine is the broadest legal doctrine in Louisiana from which an agency's obligation to conserve the state's natural resources and to protect the environment arises. Although historically narrow in scope, the public trust doctrine has been extended constitutionally or statutorily in several stated [sic],

to environmental policies and coastal zone regulation and urge the doctrine as a means to accomplishing their ends. This essay does not quarrel with their ends. However, the question of means involves more than adopting an amorphous doctrine. It involves complex issues of constitutional, property and local government law that cannot be reduced to a simple doctrine. It is also poor policy to leave such important issues to judge-to-be-developed common law doctrines. Specific constitutional provisions, precise statutes and fine-tuned administrative agency rulings give better predictability, precision and permanence.

ORIGINS OF THE DOCTRINE & LOUISIANA HISTORY

One commentator has questioned whether there is a public trust doctrine or several public trust doctrines.⁵ Adherents view the doctrine as evolving from passages in the Institutes of Justinian,⁶ from provisions in Magna Carta,⁷ from cases in England⁸ and cases in the United States.⁹ It is clear, however, that the doctrine is not a federal constitutional command. It is not federal statutory law. In most states that apply the doctrine, it is not based on state constitutions. It is a "doctrine" in the sense of a rule, principle, theory or tenet of the law¹⁰ or "a theory based on carefully worked out principles and taught or advocated by

including Louisiana, to apply to all natural resources."

Robert E. Tarcza, Comment, *The Public Trust Doctrine as a Basis for Environmental Litigation in Louisiana*, 27 Loy. L. Rev. 469, 478 (1981), stated: "For public trust purposes, however, the article [La. Const. art. IX, § 3] must be interpreted somewhat more broadly than the words of the statute permit literally; yet, it is submitted, nonetheless consistently with the spirit of the provisions; that is, the provision must be read to prevent any person from interfering with the public use, or in any way diminishing the value of the public trust. In other words, the state must not only avoid alienation, it must prevent de facto alienation by the negligent or intentional acts of a third person. In the alternative, each citizen should have a cause of action against the state should the state for some reason, or unintentionally, allow the value of the trust to be diminished by the action of any private person."

James G. Wilkins & Michael Wascom, *The Public Trust Doctrine in Louisiana*, 52 La. L. Rev. 861, 862 (1992): "No single Louisiana law clearly defines the public trust doctrine and delineates its elements."

5. Harrison C. Dunning, *The Public Trust Doctrine in Natural Resources Law and Management 1* (University of California, Davis, 1981).

6. Institutes of Justinian, Institutes 2.1.1, 2.1.4, 2.1.5, D.1.8.4 and D.1.8.6; William A. Hunter, *Introduction to Roman Law* 65 (1921); W. W. Buckland, *A Textbook of Roman Law* 183 (2d ed. 1950).

7. William Drayton, Jr., Comment, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 Yale L.J. 762, 765-68 (1972); Bernard S. Cohen, *The Constitution, The Public Trust Doctrine and the Environment*, 1970 Utah L. Rev. 388, 389 (1970).

8. William Blackstone, 1 Commentaries on the Laws of England 137-140 (1822).

9. Illinois Central R.R. Co. v. Illinois, 146 U.S. 387, 13 S. Ct. 116 (1892).

10. Black's Law Dictionary 481 (6th ed. 1990).

its adherents."¹¹ In Louisiana, writers cite various statutes and constitutional provisions as reflecting environmental protection and public use policies. But they can cite no state constitutional provision and no state statute that adopts the essence of the doctrine, that essence being that even in the absence of statute or constitutional provision the courts have a special power to override governmental decisions about public use of public lands and other environmental matters. What exists in Louisiana are many statutes governing these matters, and cases applying those statutes. Analysis of these problem areas will be done best if the exact language, history and policy of these statutes are investigated, without regard to an amorphous doctrine or theoretical construct developed by writers.

The public trust doctrine draws on a simple metaphor, the trustee at common law whose legal title to property does not confer true ownership in the sense of "direct, immediate, and exclusive authority over a thing."¹² Rather, the trustee's title is one limited to obeying a trust instrument that requires use of the property for the benefit of others, the beneficiaries. In the same way, as the doctrine goes, the government holds its property (or some of its property) not as an owner, but in a limited way that requires the property be used for the benefit of others. The beneficiaries are the "public," presumably all citizens of a state or other governmental unit. The types of uses granted the beneficiary and the limits on the trustee are not in a trust instrument, but in some body of public use principles that the government cannot overrule. Presumably, the courts would determine the scope of the beneficiaries' rights and the corresponding limits on government. This body of law would purport to be quasi-constitutional, at least in the sense that it is a court developed limitation on legislative and executive action that the other branches of government cannot overrule.

It is ironic that the metaphor would be urged in Louisiana, the state which never adopted the common law. The state's law emphasizes the civil law policy of simplicity of title rather than the division of ownership into legal and equitable titles. Its property law has used the allodial concept of ownership rather than the common law notion of estates in land.¹³ The metaphor is one that is not evolved from this state's history.

It is true that some commentators trace some of the impetus for the public trust doctrine to Roman law and to Justinian's Institutes.¹⁴

11. Webster's New World Dictionary, College Edition 429 (1960).

12. La. Civ. Code art. 477.

13. A.N. Yiannopoulos, *Property, Law of*, 15 Encyclopedia Britannica (1974), reprinted in A.N. Yiannopoulos, 1 Civil Law Property Coursebook 255 (1977).

14. Institutes 1.8.2: "Some things belong in common to all men by *jus naturale*,

Those provisions of course established the classification of common things owned by no one and provided they could be used freely by all. But if Louisiana is going to make that connection to the Institutes, it can do so directly without going through the common law complications. After all, Louisiana's civil codes were direct descendants from Roman, French and Spanish law and continued the classification of things as common, public and private.¹⁵ The current revised code provisions continue the references to public use of common things and public things.¹⁶ All that this state's judges need to do is continue to apply the statutory rules of classification and use as they currently exist. They currently exist in a modern form after revision in 1978 based on long scholarly study and consideration by the Louisiana State Law Institute and the legislature. The text, history, comments and policy statements associated with those laws are there in abundance. No need exists for the common law trustee metaphor.

In modern times, Louisiana has allowed the development of trusts, but only express trusts.¹⁷ Loose, informal trusts, as allowed by the common law, are not permitted, and it would seem that the public trust doctrine analogy is to the more amorphous, uncertain trusts than to the express trusts that Louisiana has adopted.¹⁸

some to a community corporately, some to no one, but most belong to individuals severally, being ascribed to someone on one of various grounds. 1. And indeed by natural law the following belong in common to all men: air, flowing water, and the sea, and therewith the shores of the sea."

Institutes D.1.8.4: "No one, therefore, is prohibited from going on to the seashore to fish, provided he keeps clear of houses, buildings, or monuments, since these are not, as the sea certainly is, subject to the *jus gentium*. So it was laid down by the deified Pius in a rescript to the fishermen of Formiae and Capena. But almost all rivers and harbors are public property."

Institute D.1.8.6: "This principle is taken so far as to the conclusion that people who build there are constituted owners of the ground, but only as long as the building remains there. Conversely, when the building collapses then, as if by right of *postliminium*, the place reverts to its former condition, and if someone builds in that same place, it becomes his." Theodor Mommsen et al., 1 The Digest of Justinian 24-25 (1985).

15. Compiled Edition of the Civil Codes of Louisiana, in 16 West's LSA-C.C. 276-283 (Dainow ed., 1972), containing Louisiana Civil Code arts. 448-461 (1870) and their predecessors. See David C. Slade, Putting the Public Trust Doctrine to Work 4-5 (1990).

16. La. Civ. Code art. 452.

17. A trust estates law adopted in 1920 prompted constitutional limitations in the 1921 Constitution. See Lee Hargrave, The Louisiana State Constitution: A Reference Guide 13, 188 (1991); Kathryn V. Lorio, *Louisiana Trusts: The Experience of a Civil Law Jurisdiction With the Trust*, 42 La. L. Rev. 1721 (1982).

18. See Edward F. Martin, *Louisiana's Law of Trusts 25 Years After Adoption of the Trust Code*, 50 La. L. Rev. 501, 511 (1990): "A Louisiana trust must be in writing, thus, intentionally established. A trust can be established during life by an act signed before two witnesses and a notary; moreover, a trust can be established by will at death. The form requirements for lifetime trusts are much stricter under Louisiana law than in other states."

An attempt to legitimate some kind of public trust doctrine in Louisiana case law before 1974 would have violated the constitutional prohibition against adoption of a system of laws (the common law) by reference that existed until 1974.¹⁹ If the argument is made that such an adoption could be made now, it would be inconsistent with the requirement of the 1974 constitution that only text following an enacting clause becomes legislation.²⁰ To the extent that another source of state law might be found, one could urge that a custom might have established such a rule. But at least in modern times, custom under state law only produces law if it is consistent with legislation.²¹ In any event, any kind of public trust doctrine coming from long term practices would have to be subordinate to the specific rules and provisions of statutes.

Indeed, the central point of Louisiana's civil law background and its current legal landscape is that the state is a statutory jurisdiction. In a civil law jurisdiction, it is not correct to state that judges cannot improvise at all, but it is true that judges are bound by legislation and improvise in the interstices of the legislation rather than against a customary background called the common law. The adoption by a Louisiana court of some public trust doctrine from the common law in light of the overwhelming legislation in this area would be totally inconsistent with the state's most basic legal rules.

FEDERAL LAW & LOCAL GOVERNMENT LAW

The vehicle for requiring some kind of judicial limitation on government in the management of natural resources and public lands would have to come from the United States Constitution or federal laws. In that regard, the constitutional authority is scant, although the requirement that new states be admitted on the same basis and with the same rights as the original colonies does seem statutorily based.²² Whatever the source of the federal public trust doctrine, however, federal case law appears to apply the doctrine to lands obtained by states under the

19. La. Const. art. III, § 18 provided, "The Legislature shall never adopt any system or code of laws by general reference to such system or code of laws; but in all cases shall recite at length the several provisions of the laws it may enact." Similar language was contained in the state's first constitution, art. IV, § 11 (1812). See Hargrave, *supra* note 17, at 2.

20. La. Const. art. III, § 14 (1974).

21. La. Civ. Code art. 3 (as amended 1987). See Comment (c).

22. 2 U.S. Stat. 701 (1812) provided Louisiana was "admitted into the Union on an equal footing with the original states . . ." Other states were admitted under similar legislation. See *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 108 S. Ct. 791 (1988); see A.N. Yiannopoulos, *Property* § 65, in 2 Louisiana Civil Law Treatise (1991).

equal footing doctrine.²³ Louisiana courts are required under the Supremacy Clause to follow that body of law, and to that extent, apply something that is referred to as the public trust doctrine. In those instances, the source authorities would be a small body of federal cases exploring the limits of state power to alienate all or some interests in those lands. The scope of those limits is not the main point here, but it is narrow and imprecise doctrine. It is clear that title to such lands, even beds of navigable waterbodies, can be transferred to private interests.²⁴ Louisiana courts can and must apply such a public trust doctrine to the extent required by federal law, but only to that extent. Otherwise, Louisiana courts are bound to apply the existing Louisiana statutes regulating such use as long as they are consistent with the state constitution.

Many of the cases used to support a public trust doctrine involve not state legislation, but ordinances enacted by local governments. These cases are best explained not on a constitutional level or by public trust concerns, but by more mundane issues of the scope of powers given to local governments by state law. In these matters, judicial construction of statutes to promote public use is common and proper.

THE LOUISIANA STATE CONSTITUTION

Louisiana's constitutions have contained limitations on the state's use of its lands, provisions that were adopted in reaction to problems through the state's history primarily to prevent corruption.²⁵ The 1974 constitution, in that same mode, does not contain the general scheme of legislation in the area, only some narrow limitations.

Article IX, section 3 provides that title to beds of navigable waterbodies (which would include the sea, a navigable waterbody) cannot be transferred to private persons. It states nothing about public use. The references to use in the section are to use by the state, permitting it to lease such lands to private persons for "mineral or other purposes." It also prohibits a type of use, reclamation of the bed and transfer to private persons. If land is reclaimed, use is restricted to "public use."²⁶

23. *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367 (1842); *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 13 S. Ct. 110 (1892), *aff'd*, 154 U.S. 225, 14 S. Ct. 1015 (1894).

24. The ability to transfer such rights was repeated by Justice White in *Phillips Petroleum Co.*, 484 U.S. at 483, 108 S. Ct. at 799: "Our decision today does nothing to change ownership rights in States which previously relinquished a public trust claim to tidelands such as those at issue here."

25. Lee Hargrave, "Statutory" and "Hortatory" Provisions of the Louisiana Constitution of 1974, 43 La. L. Rev. 660 (1983). See also Hargrave, *supra* note 17, at 157.

26. Private persons can reclaim beds only for land lost through erosion and then can treat it as private property under Article IX, Section 3. See also La. R.S. 41:1702 (1990).

Article IX, section 4 also protects governmental ownership in some property; land owned by the state, by school boards and by levee districts cannot be lost by prescription. Neither nonuse by the governmental entities nor possession by private individuals can result in a loss of such lands. In addition, this provision is silent about public use of such lands.

Article IX, section 4 also seeks to protect the state's mineral income. If state lands are sold, the mineral rights must be retained by the state and the state's mineral rights can not be lost by nonuse.

Article IX, section 1, as its title indicates, is a statement of policy. It provides that the "natural resources of the state, including air and water, and the healthful, scenic, historic, and aesthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with health, safety and welfare of the people" and mandates the legislature to "enact laws to implement this policy." This language was adopted instead of a provision establishing a self-executing constitutional right. The chairman of the committee that drafted the proposal explained, "We heard amendments by members of our committee who wanted to provide a citizen with the right to sue in our constitution."²⁷ But the votes were not sufficient to adopt the right.

For a court to adopt a public trust doctrine that limits the legislature in managing state property would be inconsistent with the basic principle that the legislature can adopt any rule not prohibited by the constitution.²⁸ It would be in effect establishing an additional limitation based on the concept of an unwritten constitution.

CIVIL CODE REVISION

Comprehensive legislation that governs use of public property is contained in the Louisiana Civil Code. These provisions were revised in 1978 and continue provisions that can be traced to Roman law and Justinian's Institutes.²⁹ They provide substantial rights to members of the public and give stronger protection than would be available under the common law public trust doctrine in most states.³⁰

27. IX Records of the Louisiana Constitutional Convention of 1973—Convention Transcripts 2912 [hereinafter Convention Transcripts].

28. *Hainkel v. Henry*, 313 So. 2d 577 (La. 1975); Lee Hargrave, *The Work of the Appellate Courts—1974-75*, 36 La. L. Rev. 533 (1976).

29. Yiannopoulos, *supra* note 22, §§ 19-44.

30. "Yet before anyone perceived that the trust extended to navigable freshwaters, Mississippi had already adopted the common law rule that riparian owners hold the beds of such waters to the center of the stream. See *Morgan v. Reading*, 11 Miss. (3 S. & M.) 366, 399 (1844). This has placed Mississippi's trust in an anomalous position: while the lands below tidewaters may not be alienated except for high public purposes and

Article 449 defines the category of common things — things that are unowned and cannot be owned by anyone, even the state. But it does not provide a complete listing of common things; it simply speaks of things “such as the air and the high seas.”³¹ Under the Civil Code of 1870³² “running water, the sea and its shores” were also included in the listing of common things. The quoted references were deleted in the 1978 revision in recognition of statutes that over the years claimed such things as the property of the state.³³ More important, it is stated that common things may be used by everyone “conformably with the use for which nature has intended them.” This reference to natural law could be the basis for a court asserting power to decide the scope of such permitted uses.³⁴ However, Article 452 is more specific in providing that common things are subject to “public use in accordance with applicable laws and regulations,” a reference to legislative and local government powers.

Under Article 450, the category of public things is defined: things which belong to the state or subdivisions of the state in their capacity as public persons. They are “such as running waters, the waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore.” Article 452 also states that these public things “are subject to public use in accordance with applicable laws and regulations.” One applicable law is the next sentence, which establishes the right “to fish in the rivers, ports, roadsteads, and harbors, and the right to land on the seashore, to fish, to shelter himself, to moor ships, to dry nets, and the like, provided that he does not cause injury to the property of

generally only with consent of the legislature, lands below navigable freshwaters are susceptible of wholly private ownership. The U.S. Supreme Court has ducked this anomaly by holding that, after statehood, state law controls practically everything.” *Cinque Bambini Partnership v. State of Mississippi*, 491 So. 2d 508, 517 (Miss. 1986), *cert. granted sub nom. Phillips Petroleum Co. v. Mississippi*, *aff'd*, 484 U.S. 469, 108 S. Ct. 791 (1988).

31. Charles Aubry & Charles Rau, *Property* § 45, in 2 Civil Law Translations (1961) suggest that solar heat is a common thing.

32. La. Civ. Code art. 450.

33. The 1870 provision was the same as art. 441 of the Code of 1825 and art. 3 of the Digest of 1808. Comment (c) to the provision adopted in 1978, Article 449, states, “Running water and the seashore have been taken out of the category of common things by legislation declaring that these things are owned by the state. See, e.g., R.S. 9:1101, as amended by Acts 1954, No. 443 (declaring that the waters of all bayous, rivers, lagoons, lakes, and bays ‘not under direct ownership of any person on August 12, 1910’ are owned by the state); R.S. 49:3 (declaring that the waters and bed of the Gulf of Mexico within Louisiana boundaries are owned by the state). See also R.S. 14:58; 38:216; 56:362, 1431, 1451.”

34. “If we were to hold that the bed of Lake Pontchartrain was a common thing, it could not be successfully contended that nature intended the sea or Lake Pontchartrain to be used for the purpose of erecting permanent houses therein.” *State ex rel. Saint v. Timothy*, 166 La. 738, 741, 117 So. 812, 813 (1928).

adjoining waters." But even this right is statutory, subject to being limited by other statutes. Even the right to fish is controlled by government, with respect to licenses and types and amounts of fish allowed to be taken.³⁵

Article 452 also recognizes another limit on public use of the seashore; it provides that seashore within a municipality is "subject to its police power, and the public use is governed by municipal ordinances and regulations." The state has thus delegated its powers in that regard to local government units.

Banks of navigable rivers and streams are private things that can be owned by private individuals. However, Article 456 states that those banks are subject to public use. That same rule is repeated in Article 665, which characterizes the public right as a servitude. It specifically states that "[a]ll that relates to this kind of servitude is determined by laws or particular regulations." Again, the emphasis is on governmental power to control the public use. Under the traditional case law, the type of use protected by the civil code is use related to the navigation of a stream. Presumably, one can fish from the bank into the stream, but one cannot fish in borrow pits located on the bank.³⁶ More important, Article 456 reflects the state's decision to allow land obtained by inherent sovereignty to become private property. The state obtained the beds of navigable waterbodies to the high water mark upon statehood, but then retained ownership only of the bed to the low water mark.³⁷ The bank, the area between the high and low water marks, can be privately owned.

In sum, these civil code provisions continue a traditional pattern of removing some property from the arena of private legal relations. They establish some rights of public use in these properties, and the cases over the state's history have applied these provisions to protect public uses without the need of the public trustee metaphor.³⁸

35. See La. R.S. 36:602(B) (1985); *State v. Hood*, 584 So. 2d 1238 (La. App. 2d Cir. 1991); *State v. Greco*, 583 So. 2d 825 (La. 1991).

36. *Warner v. Clarke*, 232 So. 2d 99 (La. App. 2d Cir. 1970).

37. The Digest of 1808 did not define the extent of the bank. The Civil Code of 1825, art. 448 (English) stated that banks extended to the high water mark. The French version of the article used the word "lit," which would be translated as "bed" rather than "banks." The French text in the *Projet* was "rives," which would be translated as banks. The Civil Code of 1870, art. 457, continued the use of the term "banks" as did the 1978 revision which adopted art. 456. Comment (c) states, Article 456 (1978), by declaring that the banks of navigable rivers are private things, reproduces the substance of this article. "It does not change the law." *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 108 S. Ct. 791 (1988), repeats the traditional rule that allows states to transfer title of sovereignty lands to private persons.

38. See generally Yiannopoulos, *supra* note 22, §§ 1-105. A computerized search of the use of the term "public trust" in state statutes produced few uses of the term. The

PUBLIC TRUST IN LOUISIANA CASES

Though one can find an occasional use of the expression "public trust" in supreme court decisions, no case has adopted the doctrine. A computerized search for use of "public trust" in the state supreme court decisions disclosed the first use was not until after the civil war.

In 1892, in *New Orleans City & L. R. Co. v. City of New Orleans*,³⁹ a competitor sought to enjoin the city from selling a right of way for a street railroad over a portion of Magazine Street to another railway. The plaintiff railroad claimed it had been granted an exclusive franchise by the city. The court denied the injunction, simply applying a previously adopted rule that cities cannot grant such exclusive franchises.⁴⁰ The case is thus explained by local government law principles. No state law or state agency was involved, and no waterbody or sovereignty land was involved. The court did state that "claims to exclusive privilege, under grants which are *ultra vires*, cannot be permitted to thwart or obstruct the municipal discretion in the administration of this important *public trust*, confided to them to be exercised for the benefit of the people."⁴¹ The court's reference to trust was in a generic sense and not to the city as trustee under a common law metaphor. The effect of the case was to enforce the government's decision as to how city streets would be used, not to exercise court control over such uses. Justice Fenner did question, in dictum, the power of the state to grant exclusive

text of La. R. S. 41:1614 (1990) does not use the expression, but the title of the section does. (See La. R.S. 1:13 (1987) and *Sibley v. Board of Sup'rs*, 477 So. 2d 1094 (La. 1985) for the proposition that titles are not part of the law.) The statute is a declaration of policy about management of "public lands" by the Department of Natural Resources "in accordance with this Chapter and the laws of Louisiana and the United States." Added in 1978, the section is given the title, "Declaration of policy; public trust." It is a preamble introducing a new section of provisions and has little operative effect.

La. R.S. 38:336 (1989) gave the Orleans Levee District title to property to lands reclaimed by the district. The statute provided that the state "releases the land from any public trust or dedication." It does not establish a doctrine of public trust or dedication, but appears to be a precaution to release "any" such limits on use of the property if they were to exist. Indeed, if this statute was an implicit recognition of the federally imposed public trust doctrine, it raises the issue of whether the state can release property from the limitations of such a trust obligation if it exists.

See also *Board of Levee Comm'rs v. Klein*, 226 La. 1016, 78 So. 2d 6 (1955) (no valid tax assessment because property was insusceptible of private ownership, citing Act 106 of 1922, the constitutional amendment transferring lands to the levee board to fill in along Lake Pontchartrain, which "hereby releases said lands from any public trust.").

39. 44 La. Ann. 748, 11 So. 78 (1892).

40. *New Orleans City & L.R. Co. v. City of New Orleans* held the city charter (Act 7 of 1870) did not confer power to grant exclusive privileges for the use of a street. The court's primary authority was 2 John F. Dillon, *Municipal Corporations* ¶ 727 (3d ed.).

41. *New Orleans City & L.R. Co.*, 11 So. at 80 (emphasis added).

franchises of various kinds, but the decision is primarily one construing local government powers.

*State v. Bayou Johnson Oyster Co.*⁴² was a title dispute over land covered by various waterbodies. The dispute involved salt waters within the ebb and flow of the tides, shellfish in the area, and depths of two and one-half to twelve feet. The court cited the federal rule that the United States in acquiring new territory got tide lands "for the benefit of the whole people, and in trust for the several states, to be ultimately created out of the territory."⁴³ But the issue in the case was not a matter of defining what the state could do with those properties. It was whether the state had transferred those properties to private owners. Citing the Civil Code of 1870, articles 453, 455, 509, and 510,⁴⁴ the court found that there was no intent to transfer such properties. The court found a state policy, emanating from the civil code, against private ownership of such beds. "[H]er declared policy has always been not to do so, and any statement or contract from which such effect were claimed would, necessarily, be strictly construed against the grantee."⁴⁵ Toward the end of the opinion, it cited *Martin v. Waddell*, and in a quote from Justice Taney, the theory that the king of England lost his power to make such grants.⁴⁶ There, one reads a reference to the king's ownership of beds of navigable waterbodies "as a public trust." But this use of comparative law seems to be more of a makeweight to support the determinations of state policy against such alienation, with primary reliance on state civil code provisions.

In *City of New Orleans v. Carrollton Land Co., Ltd.*,⁴⁷ the city sought recognition of its ownership of a park. It argued that private landowners could not have acquired the land by acquisitive prescription since the square was a public thing under Article 454 of the Civil Code of 1870. In upholding the city's claim, the court stated, "Such property is out of commerce. It is dedicated to public use, and held as a public trust, for public uses. It is inalienable by corporations."⁴⁸ No issue of the state violating a use requirement of a public thing was involved, but rather the powers of a governmental subdivision. Also, the public trust analogy in the original opinion was weak. The case did not involve sovereignty lands or waterbodies, but a public square. Indeed, even as

42. 130 La. 604, 58 So. 405 (1912).

43. *Id.* at 609, 58 So. at 407.

44. Corresponding to current Louisiana Civil Code arts. 450, 456, 499 and 500.

45. *Bayou Johnson Oyster Co.*, 130 La. at 618, 58 So. at 410.

46. For criticism of *Martin v. Waddell* as being based on "no authority whatsoever," see MacGrady, *supra* note 3, at 590.

47. 131 La. 1092, 60 So. 695 (1913).

48. *Id.* at 1094, 60 So. at 696. The quoted language also appeared in Comment (b) to Article 450 of the revised article adopted in 1978.

dictum that such property cannot be sold to private interests, the case has not been followed. Justice Watson in the original opinion in *Coliseum Square Ass'n v. City of New Orleans*,⁴⁹ relied on that language in stating that the city could not close part of a street and lease it to private citizens. On rehearing, the majority rejected that view and held, consistently with civil code provisions and the city's home rule charter, that it could terminate such uses. *State ex rel. Ruddock Orleans Cypress Co. v. Knop*⁵⁰ contained only a passing reference to the city's argument that it had power to change location of a street and thus close an old street: "the governing authorities administer them as a public trust for the benefit of the inhabitants of the city and state"⁵¹ Those were not the court's words, but the city's.

*Emery v. Orleans Levee Board*⁵² was a petitory action based on redemption of property adjudicated to the state for nonpayment of taxes. In defense, the levee board argued that the state dedicated the property in question for use in the Bohemia Spillway. Thus, the property was public and not subject to redemption. The court agreed, stating that several state statutes indicated the legislature intended the lands in the spillway be "removed from commerce."⁵³ The court, in reference to such dedicated property, repeated the language from *Carrollton Land Co.*, "Such property is out of commerce. It is dedicated to public use, and held as a public trust, for public uses. It is inalienable by corporations."⁵⁴ Again, however, this language is not used in reference to the state allegedly violating some public trust. The decision is based on a state statute that limited loss of rights by a subdivision of the state. There was no overriding of state laws by a court.

*California Co. v. Price*⁵⁵ was the oft-criticized 4-3 decision which allowed private ownership of (and thus the mineral proceeds from) part of the bed of the sea.⁵⁶ The basis of the decision was statutory construction: that Act 62 of 1912 was intended to prohibit the state from contesting any patents after a six year period had accrued, even patents that included the bed of the sea. Its underlying assumption was that no constitutional prohibition existed to prohibit the state from trans-

49. 544 So. 2d 351 (La. 1989).

50. 147 La. 1057, 86 So. 493 (1920).

51. *Id.* at 1065, 86 So. at 496.

52. 207 La. 386, 21 So. 2d 418, *cert. denied*, 325 U.S. 879, 65 S. Ct. 1572 (1945).

53. *Id.* at 395, 21 So. 2d at 421.

54. *Id.*

55. 225 La. 706, 74 So. 2d 1 (1954), *overruled by* *Gulf Oil Corp. v. State Mineral Board*, 317 So. 2d 576 (La. 1974).

56. "Grand Bay is a body of salt water, navigable in 1812 and also presently, lying east of the Mississippi at or near the southern extremity of Breton Sound and connecting with the Gulf of Mexico." *Price*, 225 La. at 710, 74 So. 2d at 2.

ferring such lands until 1921, when a constitutional prohibition against doing so was adopted.⁵⁷ On this latter point, the decision appears correct,⁵⁸ the former proposition as to legislative intent was questionable.

On rehearing, the court dealt with whether *Price* conflicted with *Miami Corp. v. State*,⁵⁹ which held private lands that became part of the bed of a navigable lake were insusceptible of private ownership. *Price* was inconsistent with a strict reading of *Miami*, but the court did not change its opinion. In dissent, Justice Fournet did refer to beds of arms of the sea as "vested in the state in trust for all the people, by virtue of its inherent sovereignty."⁶⁰ Justice Hawthorne's dissent relied primarily on the civil code.⁶¹ He stated, "Of course prior to 1921 there was no constitutional prohibition against the Legislature's disposing of the lands and property which the State held for the use of all of the people, but, as far as I can ascertain, to this day there has never been an act of the Legislature authorizing the sale or transfer of the bed of an arm of the sea"⁶² He did compare Louisiana law to common law states which did not have statutes as precise as Louisiana's, giving a string cite to cases discussing holding property in trust. He did refer to "[t]his public trust" but again, it was hardly a studied adoption of a whole doctrine.⁶³

When the supreme court overruled *Price* in *Gulf Oil Corp. v. State Mineral Board*,⁶⁴ another 4-3 decision, the emphasis again was on statutory construction and legislative intent in 1912, not on questions of state power to alienate such lands before 1921. Justice Barham's opinion on rehearing was a tour-de-force bringing to bear all the possible authorities on the question and providing several theories for overruling *Price*. The first and foremost authorities were in the civilian mode, not surprisingly, as Justice Barham was one of the leading exponents of the

57. *Id.* at 715, 74 So. 2d at 4; La. Const. art. IV, § 2 (1921).

58. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 108 S. Ct. 791 (1988).

59. 186 La. 784, 173 So. 315 (1936), *cert. denied*, 302 U.S. 700, 58 S. Ct. 19 (1937).

60. *Price*, 225 La. at 748, 74 So. 2d at 16.

61. La. Civ. Code art. 482 (1870) (common things).

62. *Price*, 225 La. at 760, 74 So. 2d at 20.

63. In *California Co. v. Price*, 234 La. 338, 99 So. 2d 743 (1957), *overruled by* *Ugulano v. Allstate Ins. Co.*, 367 So. 2d 6 (La. 1978), the court applied res judicata principles to halt an attempt to relitigate allocation of continuing income from wells in Grand Bay. Justice Hawthorne concurred. There were two dissents, including Justice Fournet who relied primarily on *Illinois Central R.R. Co.* and its language about holding such property in trust. *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 13 S. Ct. 116 (1892). In overruling *Price*, *Ugulano* rejected the doctrines of res judicata and collateral estoppel for Louisiana.

64. 317 So. 2d 576 (La. 1975).

civilian renaissance in Louisiana.⁶⁵ He first cited Civil Code articles 449, 450 and 453 and referred to a "strong public policy against private ownership of navigable waters bodies embodied in the Civil Code articles"⁶⁶ Still in a civilian pattern, he then cited several state statutes outside the civil code that over the years reflected that same civil code policy.

He then cited later constitutional provisions prohibiting such alienation;⁶⁷ Tulane law review critiques;⁶⁸ the maxim of strict construction of preemption statutes;⁶⁹ a Paul Hebert and Carlos Lazarus Louisiana Law Review article critical of *Price*;⁷⁰ Yiannopoulos' treatise on property;⁷¹ and federal court construction of a similar federal prescriptive statute.⁷²

Only then did he say, "Another factor influencing our conception of the intended purpose of Act No. 62 is one which perhaps could, in itself, be dispositive of the issue before us had we chosen to rely solely upon it. The right of ownership of navigable water bottoms was vested in the State of Louisiana upon its admission into the Union in 1812 but only in the capacity of trustee for the interest of the people of the state."⁷³ He then cited *Illinois Central Ry. v. State of Illinois*⁷⁴ and Madden on the public trust.⁷⁵ He also cited the possible power of legislatures to interpret the meaning of earlier statutes.⁷⁶ Finally, he stated, "In conclusion, we hold that patents conveying state property to private individuals are ineffective insofar as they purport to alienate the beds of navigable waters, and that Act No. 61 of 1912 did not

65. Mack E. Barham, *A Renaissance of the Civilian Tradition in Louisiana*, 33 La. L. Rev. 357 (1973); Mack E. Barham, *Methodology of the Civil Law in Louisiana*, 50 Tul. L. Rev. 474 (1976). See Kenneth M. Murchison, *The Judicial Revival of Louisiana's Civilian Tradition: A Surprising Triumph for the American Influence*, 49 La. L. Rev. 1 (1988).

66. *Gulf Oil Corp.*, 317 So. 2d at 583.

67. *Id.* at 583-84. La. Const. art. IV, § 2 (1921); La. Const. art. IX, § 3.

68. *Gulf Oil Corp.*, 317 So. 2d at 585; J. C. Senter, Jr., Comment, *Ownership of the Beds of Navigable Lakes*, 21 Tul. L. Rev. 454, 473 (1947).

69. *Gulf Oil Corp.*, 317 So. 2d at 585.

70. *Id.* at 586; Paul M. Hebert & Carlos E. Lazaraus, *Legislation Affecting the Civil Code*, 15 La. L. Rev. 9, 21-22 (1954).

71. *Gulf Oil Corp.*, 317 So. 2d at 587. Yiannopoulos, *supra* note 22, § 32.5 n.140.8 at 19.

72. *Gulf Oil Corp.*, 317 So. 2d at 587. *Northern Pac. Ry. Co. v. United States*, 227 U.S. 355, 33 S. Ct. 368 (1913).

73. *Gulf Oil Corp.*, 317 So. 2d at 589.

74. *Illinois Central Ry. v. State of Illinois*, 146 U.S. 387, 13 S. Ct. 116 (1892).

75. *Gulf Oil Corp.*, 317 So. 2d at 583. Madden was an assistant attorney general who participated in the argument of the second *Price* case and who espoused the state's interest in public lands in John L. Madden, *Federal and State Lands in Louisiana* (1973).

76. *Gulf Oil Corp.*, 317 So. 2d at 589.

have the effect of ratifying such absolutely null transfers. Thus the State was the owner of the entire property involved in this case. We expressly overrule the holdings in *California v. Price*, *State v. Cenac*, and all other cases where a contrary view is expressed."⁷⁷

This analysis is hardly an adoption of a state public trust doctrine. The primary reliance is on civilian principles. To the extent a public trust doctrine is referenced, it is one that is compelled by the federal cases. That statement of a federal rule prohibiting alienation of sovereignty lands is probably not correct in any event, as Justice O'Connor stated in *Phillips Petroleum v. Mississippi*.⁷⁸

*City of New Orleans v. Louisiana SPCA*⁷⁹ held that the city could not sell Commerce Place to private owners. New Orleans acquired the public square by dedication by a private owner and the court simply held that the city had no power to change the use and to alienate the land. The court relied primarily on the issue of powers delegated to municipalities from the state. The court does refer to such property as held by the city "as a trustee in trust for the use and benefit of the citizens of the municipality,"⁸⁰ citing *Dillon* and common law authorities.⁸¹ The court even stated that the fact that the city determined the property was no longer necessary did not authorize a sale. However, that result is inconsistent with later statutes and the *Coliseum Square* case.⁸² Indeed, despite the public trust language, the case is probably best reconciled on a procedural basis. The city failed to comply with a state statute that provided that such property could be sold if the city obtained the consent of seventy percent of the landowners within a radius of 300 feet of the property. In any event, the case did not involve waterbodies and the issue was the power of the city, not that of the state.

*Arnold v. Board of Levee Commissioners*⁸³ was a taxpayer suit to enjoin construction of the F. Edward Hebert library by a non-profit corporation on property leased from a levee board for a nominal sum. The property was dry land reclaimed from the lake bed by the board and the plaintiff's argument was that the property could not be so used.

77. *Id.* at 592.

78. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 487, 108 S. Ct. 791, 801 (1988).

79. 229 La. 246, 85 So. 2d 503 (1956).

80. *Louisiana SPCA*, 229 La. at 259, 85 So. 2d at 507.

81. *Id.* at 261, 85 So. 2d at 508; *State ex rel. Northern Pac. Ry. Co. v. Superior Court*, 238 P. 985 (1925); *People ex rel. Lehigh Valley Ry. Co. v. State Tax Comm'n*, 206 App. Div. 549, 202 N. Y. S. 310 (1923).

82. *Coliseum Square Ass'n v. New Orleans*, 544 So. 2d 351 (La. 1989). *See infra* text accompanying note 94.

83. 366 So. 2d 1321 (La. 1978).

The court allowed the lease, stating that even if the land was dedicated as a park, the board could change the use. Constitutional provisions allowing reclamation of the lake bed⁸⁴ were cited as releasing "said land from any public trust" ⁸⁴ Again, the term was used, but it is not the basis for court prohibition of governmental activity because inconsistent with a public trust doctrine.

In *Save Ourselves, Inc. v. Louisiana Environmental Control Commission (ECC)*,⁸⁵ because of the poor state of the record, the court concluded "we cannot determine whether the agency followed correct interpretations of its constitutional and statutory duties, or whether its determinations are arbitrary, capricious or unreasonable."⁸⁶ It therefore remanded for further proceedings to determine whether the commission had properly issued a waste permit. Justice Dennis wrote a wide ranging opinion using many theories to support the decision. After citing *Illinois Central* and other federal precedents, he stated, "A public trust for the protection, conservation and replenishment of all natural resources of the state was recognized by Article VI, Section 1 of the 1921 Louisiana Constitution."⁸⁷ That provision of the 1921 Constitution read, "The natural resources of the State shall be protected, conserved and replenished." Dennis also stated, "The public trust doctrine was continued by the 1974 Louisiana Constitution, which specifically lists air and water as natural resources, commands protection, conservation and replenishment of them insofar as possible and consistent with health, safety and welfare of the people, and mandates the legislature to enact laws to implement this policy." In using the term "public trust doctrine" here, Justice Dennis is using it in a general policy sense and not in the strict sense of a court's power to control state use of sovereignty land absent a statute. Justice Dennis was a delegate to the Constitutional Convention of 1973 and voted for the proposal that became Article IX, Section 1—for a general policy statement rather than a self-executing constitutional right.⁸⁸ Also, he used the term "public trust" not in the context of waterbottoms, but as applying to air and other natural resources. If he were referring to a court empowering doctrine, it is one that would allow the courts to act as umpires of governmental action in those

84. La. Const. art. XVI, § 7(h) (1921); discontinued in the 1974 Constitution but continued as La. R.S. 38:1235.2, by 1975 La. Acts No. 729 and then as La. R.S. 38:336 by 1985 La. Acts No. 130.

85. 452 So. 2d 1152 (La. 1984).

86. *Id.* at 1154.

87. *Id.*

88. Convention Transcripts, *supra* note 27, at 2912. Chairman Lambert explained the section, "We heard amendments by members of our committee who wanted to provide a citizen with the right to sue in our constitution." But those amendments were rejected, and a policy statement was adopted instead.

environmental areas listed, even the "scenic, historic and aesthetic quality of the environment." This expansion would go far beyond any conception of the common law public trust doctrine.

The opinion in *Save Ourselves* also relies heavily on environmental statutes: "In implementation of the public trust mandate, the legislature enacted . . ."⁸⁹ Indeed, the use of the word "mandate"⁹⁰ and the citation to legislation is a recognition that the constitutional provision is not self executing and is a nonenforceable policy statement addressed to the legislature.

At another point, it is stated that the ECC is "the primary public trustee." But that is after concluding that a number of statutes make it so and not within the context of the court imposing a standard absent legislation. It is also stated, "However, it should be kept in mind that the Louisiana regulatory framework is also based on state constitutional provisions and the public trust concept. La. Const. Article IX, Section 1. For general commentary on the public trust doctrine, see . . ."⁹¹ followed by the usual citations. But again, this must be kept within the context of a permit case in which a number of statutes were adopted to implement the constitutional mandate.

*Todd v. State*⁹² was a possessory action against the state. In listing authorities, the court used the term public trust in passing, citing the language from *Carrollton Land* quoted earlier.⁹³ This was in the original opinion when the court allowed the possessory action to proceed. On rehearing the court did not use the argument, relying instead on Article XII, Section 13 of the state constitution and on French authority.

In *Coliseum Square Ass'n v. New Orleans*⁹⁴ on original hearing, the court prohibited closing part of a street and leasing it to a private school. In that opinion Justice Watson did use the language from *Carrollton Land*: "Such property, held as a public trust, is inalienable while it is being used by the public." "Only if public use terminates can a public street be susceptible of private ownership."⁹⁵ Dissenting, Justice Calogero used the more traditional civilian analysis, citing Yianopoulos, "Public things are only inalienable as long as it is determined

89. *Save Ourselves*, 452 So. 2d at 1154 (citations omitted).

90. Hargrave, *supra* note 25; Lee Hargrave, *Developments in the Law*, 38 La. L. Rev. 438, 441 (1978).

91. William H. Rodgers, *Environmental Law* § 2.16 at 170 (1977); Sax, *supra* note 1; Judith J. Johnson and Charles F. Johnson, III, Comment, *The Mississippi Public Trust Doctrine: Public and Private Rights in the Coastal Zone*, 46 Miss. L.J. 84 (1975).

92. 456 So. 2d 1340 (La. 1984), *amended*, 474 So. 2d 430 (1985).

93. *Id.* at 1346. La. Civ. Code arts. 448-9, 450, 452-3, 455; La. Const. art. IX, § 3, art. IX, § 4, art. X, § 10(c).

94. 544 So. 351 (La. 1989).

95. *Id.* at 353.

that they are subject to, or needed for, public use.”⁹⁶ Justice Dennis also dissented, emphasizing local government law principles and pointing out that the 1974 Constitution enlarged local government powers. He stated that no general law existed to prohibit a home rule city from closing a street and leasing or selling its public property formerly dedicated to that purpose. Justice Lemmon also dissented. On rehearing, in an opinion by Justice Marcus, the court held that the city had power to close part of the street and lease it if its conduct was not arbitrary or unreasonable. Judge, now Justice, Hall substituted for Justice Lemmon on rehearing, and only Justices Dixon and Watson dissented. Thus, in a clear case where a version of a public trust doctrine developed by the courts and applied to municipalities might have been invoked, the supreme court did not do so and allowed a governmental unit to terminate public use of public property.

Most recently, the court in *In re American Waste & Pollution Control*⁹⁷ cited *Save Ourselves* stating in passing: “it was not until the adoption of Article IX, Section 1 of the 1974 Constitution that the ‘public trust doctrine . . . mandate[d] the legislature to enact laws to implement this policy.’”⁹⁸ The court recognized that this provision “delegated specific decisions regarding protection of the state’s environment to the Legislature.”⁹⁹ It also pointed out that the constitutional convention rejected proposals to allow private citizen suits to contest environmental concerns in the absence of statutes. Again, this is not the adoption of the common law public trust doctrine that would allow the courts to determine what the fiduciary duties of the state as trustee are.

96. Yiannopoulos, *supra* note 22, § 34, at 95.

97. 88 588 So. 2d 367 (La. 1991).

98. *Id.* at 372.

99. *Id.*

